No. 93-1636

(8)



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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TOM SWINT, TONY SPRADLEY, DRUCILLA JAMES and JEROME LEWIS,
*Petitioners,*

v.

CHAMBERS COUNTY COMMISSION, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR RESPONDENT CHAMBERS COUNTY COMMISSION

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MISCELLANEOUS

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### STATEMENT

This is an action under 42 U.S.C. § 1983 in which petitioners seek to hold the governing body of an Alabama County, respondent Chambers County Commission, liable for allegedly unconstitutional actions taken by the sheriff in that county, James C. Morgan. The Eleventh Circuit ruled that the Sheriff could not, through his conduct, create "policies" attributable to the County under section 1983 because he is not a County official and the County is not authorized by state law to play any role in law enforcement.

**The Place of Sheriffs in the Alabama Governmental Structure**

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1. Unlike in some states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[1] *See id.* §§ 11-3-10, 11-3-11, 11-14-10. There is no statute authorizing counties to engage in law enforcement.

The nature and functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. Under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

Sheriffs in Alabama have three basic functions: (1) assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1), (2) operating the jail, *id.* § 14-6-1, and (3) enforcing state law in their county, *id.* § 36-22-3(4). With respect

[1] This Court recognized just two years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 824 (1992) (citing Ala. Code §§ 11-3-1, -10).



to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[2] With respect to jail operations, they receive general supervision from the Alabama Board of Corrections. *See id.* §§ 14-6-84, -85, -86, -90, -98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations by the governor, the state attorney general, or the district attorney. *Id.* § 36-22-5.[3] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specified that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[4] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama."

[2] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* § 36-22-2(3).

[3] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

[4] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

*Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444 ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[5]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See* Pet. App. 33a-34a (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* § 36-22-16 (duty to pay a specified salary to sheriff); *id.* § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990).

**The Facts of this Case**

Petitioners have alleged that they were deprived of rights under the Fourth and Fourteenth Amendments during two law enforcement raids of a night club in Chambers County, Alabama, known as the Capri Club. These raids occurred after the Chambers County Sheriff's

[5] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.



Department and the City of Wadley Police Department received numerous complaints concerning sale of illegal drugs at the club. The Sheriff's Department, the police departments of the cities of Wadley, Lafayette, Lanett, and Valley, and the Alabama Alcoholic Beverage Control Board participated in these raids.

In each instance, the raid occurred after an undercover officer had entered the Capri Club and purchased drugs with marked money. During the first raid, it is alleged that those present were not allowed to move or leave while the law enforcement officers conducted an extensive search. There were two arrests relating to the sale of drugs, some illegal liquor was seized, and several minors were found in the club as well. The second raid occurred three months later, after the Sheriff's Department received more complaints about drug dealing in the club. On this occasion, there were no arrests, and it is alleged that the officers abusively searched some individuals on the premises and threatened others with loaded guns.

Petitioners filed suit in federal court against the City of Wadley, the Chambers County Commission, and three individuals, Wadley Police Chief Freddie Morgan, Wadley Police Officer Gregory Dendinger, and Chambers County Sheriff James C. Morgan.[6] They sought declaratory, injunctive, and compensatory relief, alleging that these defendants had conducted illegal searches and seizures and had also deprived them of due process and equal protection of the laws.[7] On January 22, 1992, the district court

[6] These persons were sued in both their individual and official capacities. Also named originally was the Chambers County Sheriff's Department, but this defendant was dismissed because a sheriff's department is not a suable entity under Alabama law.

[7] In addition to section 1983, the complaint sought relief under 42 U.S.C. §§ 1981 and 1985(3). The section 1981 claims were dismissed in the district court. The section 1985(3) claims against respondent Chambers County Commission were treated in tandem

issued an order that, *inter alia,* dismissed the claims against Sheriff Morgan in his official capacity, to the extent that they involved a request for money damages, on the ground that he is a state official covered by the Eleventh Amendment.

The defendants then filed summary judgment motions. The individual defendants relied primarily on claims of qualified immunity. Respondent Chambers County Commission argued that it could not be held liable for the raids under 42 U.S.C. § 1983 because (1) it did not participate in the raids, (2) no county policy or custom was involved, and (3) Sheriff Morgan is a state official and is not authorized or empowered to set *county* policies on law enforcement through his own actions. *See* Pet. App. 55a.

The district court rejected the bulk of the qualified immunity claims raised by the individual defendants. Pet. App. 57a-62a. It also refused to grant summary judgment to the Chambers County Commission, concluding that "Sheriff Morgan, in his capacity as the chief law enforcement officer for the county, *may* have been the final policy maker for the County in making his decision to approve the allegedly illegal raids." *Id.* at 67a (emphasis added). Although acknowledging that the Sheriff "is a State of Alabama employee," the court was unwilling to rule out the possibility that he was also authorized to make decisions for the County in the area of law enforcement. *Id.* It noted three features of state law that might support such a conclusion: (1) the Sheriff was required to deputize participants in the raids who came

with the section 1983 claims in the court below, although the question presented in this Court is limited to section 1983.

Petitioners' complaint also included pendent state claims involving assault and false imprisonment (Count III) and negligence (Count IV). All state claims against the Chambers County Commission were, however, dismissed without opposition from petitioners in the district court because they had failed to file a claim initially with the County, as required by state law.



from outside the County, (2) the Sheriff is charged with ferreting out crimes and arresting criminals in a given county, and (3) the County Commission is required to furnish him with necessary equipment to be used for that purpose. *Id.*

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[8] With respect to the claims against the County Commission, the court of appeals held that the district court had erred in refusing to grant summary judgment. It noted, first, the basic principle set forth in *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978), that municipal liability under section 1983 may not be predicated on a theory of *respondeat superior* but may be based on the "acts of an official who 'possesses final authority to establish municipal policy with respect to the action ordered.'" Pet. App. 31a (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481 (1986)). The court further stated that the relevant "policy or custom" need not have been adopted by the municipality's legislative body but may also have been created by an official who has final policymaking authority in a particular area of the municipality's business. Pet. App. 32a. It added that the question whether a given official has such authority is a matter of state law. *Id.*

In examining state law, the court of appeals noted that under Alabama law counties cannot be subjected to tort

[8] The three individual defendants had filed interlocutory appeals from the denial of their qualified immunity claims. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (authorizing such appeals). The Chambers County Commission had filed a separate appeal from the denial of its motion for summary judgment, asking the court of appeals either to treat this denial as an appealable collateral order or to exercise discretionary pendent appellate jurisdiction over this issue. The Eleventh Circuit rejected the collateral order theory, Pet. App. 28a-30a, but agreed to exercise pendent jurisdiction, *id.* at 30a-31a.

The court of appeals ruled, with respect to the qualified immunity issue, that the individual defendants should have prevailed on the due process claim. Pet. App. 27a.

liability based on the actions of sheriffs, because the Alabama Constitution designates sheriffs as *state* executive officers. *Id.* (citing *Parker v. Amerson,* 519 So. 2d 442, 443 (Ala. 1987)). The court then considered the possibility that sheriffs, although part of state government, might still implement *county* policy in their law enforcement activities. *Id.* at 32a-33a. It discussed its own prior decision in *Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989), which held that Alabama counties and sheriffs operate county *jails* in "partnership" and that sheriffs accordingly can set county policy in that area.

The court of appeals concluded, however, that counties and sheriffs do not have a similar "partnership" in the area of law enforcement. Sheriffs are, by statute, duty-bound to " 'ferret out crime' " and to " ' apprehend and arrest criminals,' " Pet. App. 33a (quoting Ala. Code § 36-22-3(4) (1991)), but "no similar law enforcement duty or authority has been bestowed upon the County itself," *id.* To the contrary, the court held, a county commission would violate state law if it became involved in law enforcement. In sum, following three consistent prior decisions of federal *district* courts in Alabama, Pet. App. 34a (citing cases), the court of appeals concluded that "Sheriff Morgan is not the final repository of Chambers County's general law enforcement authority, because it has none." *Id.* Thus, the section 1983 claims could not be pursued against the County Commission.[9]

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[9] The court of appeals then held that the Sheriff's status under state law was also fatal to petitioners' claims under 42 U.S.C. § 1985(3). There was no evidence that the County Commission itself participated in a conspiracy within the meaning of that statute and the Sheriff's alleged participation did not itself create a county policy or custom causally related to the conspiracy. Pet. App. 34a-35a.

Sheriff Morgan filed a suggestion of rehearing *en banc,* and the panel responded by modifying its opinion to preclude petitioners from proceeding with their equal protection claim against Sheriff Morgan on remand. *See* Pet. App. 41a-44a. The court reasoned



## SUMMARY OF ARGUMENT

Petitioners offer only one basic argument for holding the Chambers County Commission liable under section 1983 based on Sheriff Morgan's law enforcement activities. They contend that the Sheriff *looks* more like a county official than a state official. In so arguing, they ignore the real issue. Under *Monell v. Department of Social Servs.,* 436 U.S. 658 (1978), and its progeny, in order to determine whether the Sheriff is a "policymaker" for the County, it is necessary to go beyond appearances and examine the actual distribution of authority over law enforcement under state law. Such an examination reveals that the Sheriff does not speak for the County in the area of law enforcement, because his authority over law enforcement does not emanate from the County Commission and cannot be withdrawn by the County Commission. In fact, the County, as such, is not authorized to play any role in law enforcement at all.

1. It is undisputed that the question presented in this case should be answered based on state law. *See Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988) (plurality opinion). Here, the Alabama Constitution expressly designates sheriffs as *state* executive officials. Ala. Const. art. V, § 112. All oversight of their operations is exercised by other state officials—the governor, the attorney general, judges and district attorneys. County commissions have no authority over sheriffs' law enforcement activities. Nor are they authorized under state law to have *any* policies of their own in the field of law enforcement. The Eleventh Circuit was thus plainly correct when it held that the Sheriff was not exercising "county power," or creating county "policies," when he authorized the drug raids at issue here.

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that there was insufficient evidence to allow a reasonable fact-finder to conclude that the Sheriff's approval of the raids at the Capri Club reflected intentional racial discrimination on his part.

2. Petitioners argue that the role of the Chambers County Commission in law enforcement is irrelevant since the Sheriff speaks for "the County" in that field. This argument is fundamentally inconsistent with the analysis of section 1983 set forth in *Monell*.

a. The reason the *Monell* Court decided to treat municipalities as "persons" under the statute was their status as separate corporations. The Court concluded that, at the time of section 1983's passage, it was understood that corporations are "persons" for most purposes. 436 U.S. at 687-89. But if that is the legal basis for allowing municipal liability, it makes no sense to hold counties liable for acts of sheriffs over whom they have no control. A "corporation," after all, does not typically (if ever) include officers or employees who have the power to bind the corporate entity but are immune from control by its governing board. Petitioners are in reality offering a conception of a municipality as a unit of *geography*, with the county governing board being held strictly liable for all violations of federal law committed by any official who happens to operate in that particular geographic area. *Monell* does not support such an approach.

b. Indeed, *Monell* specifically limits municipal liability to cases where the municipality *caused* the violation pursuant to an official policy. 436 U.S. at 692. This limitation was based both on the language of section 1983, *id.* at 691-92, and on Congress's rejection in 1871 of the Sherman amendment—a proposal that would have held municipalities vicariously liable for the violent actions of their private citizens, *id.* at 693-94. This causation requirement plainly is not satisfied in this case.

To begin with, as the *Monell* Court noted, the one thing that Congress clearly did not intend was imposition of liability for law enforcement actions or inactions *on municipal entities not authorized to engage in law enforcement*. That is precisely what petitioners seek to impose in this case. More generally, *Monell* held that the causation requirement precludes actions against municipalities based on a *respondeat superior* theory. Here, however, petitioners' claim would fail even under a *respondeat superior* theory, since they do not claim that the County Commission has control over the Sheriff. Thus, petitioners are asking the Court to impose a form of vicarious liability even broader than that *rejected* in *Monell*.



c. Petitioners' argument that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), is wholly unpersuasive. That case did not involve the question whether a sheriff is a county policymaker. While the Court noted, and did not take issue with, the *Sixth Circuit's* holding that a sheriff spoke for a county, it did not analyze the question itself. *Id.* at 484. In any event, *Pembaur* involved Ohio law, which is very different from Alabama law with respect to the relationship between sheriffs and county governing boards.

d. Petitioners have also failed to offer any commonsense explanation of why counties in Alabama should be liable for the actions of sheriffs. There is no danger that states will seek to insulate their municipalities from liability by transforming other municipal officials into state officials operating outside the control of municipal governing bodies. Nor would the cause of deterrence be served by imposing liability on a party that is powerless to prevent future violations of federal rights.

What petitioners are really seeking here is guaranteed access to the County's "deep pocket." But that is not a proper basis for expanding the scope of section 1983. In *most* section 1983 actions, the only available defendant is the individual official, sued in his individual capacity. That is what Congress intended in every case except those where municipalities directly cause violations of federal law. That did not occur here.

## ARGUMENT

The Eleventh Circuit correctly ruled that Sheriff Morgan's law enforcement decisions could not form the basis of a section 1983 action against Chambers County. Municipal liability under section 1983 arises only when the municipality itself has "caused" a deprivation of federal rights through the establishment of an illegal policy. That requirement is satisfied in a case where the official accused of wrongdoing was exercising policymaking authority previously delegated by the municipality's governing body, and is therefore subject to that body's potential control. The requirement is *not* satisfied, however, where a plaintiff seeks to hold a municipality liable for the actions of a person holding an office it did not create, wielding power it did not delegate, in ways it cannot control. Such a result would amount to an extreme form of vicarious liability—precisely the rule rejected by this Court in *Monell*. Thus, where, as here, state law establishes a locally based state office, immune from control by the county commission, section 1983 is properly interpreted as authorizing a suit only against the person who holds that office, and not against the county.

### I. THE QUESTION PRESENTED HERE TURNS ON STATE LAW.

Section 1983 provides a remedy for violations of federal law occurring under color of state law. In the large majority of cases, including all cases involving state officials and most involving local officials, the only potential defendants are the public officials themselves, sued in their individual capacity. In *Monell*, this Court held that cities and counties are also "persons" within the meaning of section 1983, and thus may be held liable for their violations of the Constitution or federal law *if* those violations occur pursuant to an official governmental policy or custom. Such a policy or custom, the Court added, may be created by the municipality's legislators or "by those



whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

Since *Monell*, the Court has addressed the question whether particular municipal officials had sufficient authority to constitute municipal "policymakers." *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (city department heads and employment policy); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (school principal and superintendent and policy governing employee transfers). *See also Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (ruling that a "single act" may constitute a "policy"). It has not addressed a question like that presented here—*i.e.*, whether a given official, who clearly possesses policymaking authority, is properly viewed as a policymaker for a particular municipal government.

*Praprotnik* and *Jett* are nevertheless important in the present context, because they make it clear that this case must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). *See also* Pet. Br. 15 (acknowledging that state law governs). "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett*, 491 U.S. at 737. Using relevant legal materials, it is up to the judge to identify those officials who "speak with final policymaking authority for the local governmental actor" whom the plaintiff seeks to hold liable. *Id.*

### II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT SHERIFFS IN ALABAMA ARE NOT COUNTY POLICYMAKERS WAS BASED ON A STRAIGHTFORWARD APPLICATION OF STATE LAW.

The Eleventh Circuit ruled that sheriffs do not set law enforcement policies for Alabama counties. That ruling

was based on principles of state law that are neither disputed nor controversial. Especially in view of the Court's practice of "generally accord[ing] great deference to the interpretation and application of state law by the courts of appeals," *Pembaur*, 475 U.S. at 484 n.13, there is no reason for this Court to reach any other conclusion.

The court of appeals focused, in its analysis of state law, on the distribution of authority over law enforcement activities in Alabama. First, the court noted that the Alabama Constitution expressly includes sheriffs in the "executive department" of *state* government. Ala. Const. art. V, § 112; *see* Pet. App. 32a; p. 2 *supra*. This designation is reflected in the fact that county commissions in no way control the activities of sheriffs. *See Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (no authority to hire or fire deputies); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (no control over jail operations). As a result, in state cases, a sheriff is not treated as an " 'employee of a county for purposes of imposing liability on the county under a theory of respondeat superior.' " Pet. App. 32a (quoting *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987)). *See also King v. Colbert County*, 620 So. 2d at 625 ("The sheriff's authority over the jail is totally independent of the Colbert County Commission. . . . Therefore, . . . Colbert County itself cannot be held vicariously liable for his actions or inaction."). In other words, under state law, a sheriff is not even an *agent* of the county—let alone a *policymaker*.

The Eleventh Circuit went on to consider whether Sheriff Morgan, in performing a law enforcement function, might still be said to be setting county policy by exercising " 'county power.' " Pet. App. 33a (quoting *Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989)). It determined that law enforcement duties are assigned directly to sheriffs by state statute, *id.* (citing Ala. Code § 36-22-3(4)), and that *counties* are barred by state law from playing any role in law enforcement,



*id.* at 33a-34a.[10] As a result, the court held, the sheriff could not have been "the final repository of Chambers County's general law enforcement authority, because it has none." Pet. App. 34a.[11]

In sum, the court of appeals determined, based on its review of state law, that the express designation of sheriffs as state officials in the Alabama Constitution was not some sort of sham, perhaps intended to avoid liability under section 1983, but fairly reflected the long-standing distribution of power. Sheriffs in Alabama do have a substantial degree of policymaking authority in the area of law enforcement. But, as the court of appeals recognized, this authority did not come from the county commissions and could not be retracted by those commissions. Counties simply do not play a role in setting law enforcement policy, and thus should not be exposed to liability under section 1983 when such policies are established by state officials whom they do not control. *See also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990) (county cannot be sued for misfeasance in jail run by sheriff who answers only to the electorate and not to the county board); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989) ("Where, as here, controlling law places limits on the County's authority over the district attorney, the County cannot be said to be respons-

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[10] The court of appeals explained that no statute authorizes counties to play a role in law enforcement and that, under state law, counties are " 'authorized to do only those things permitted or directed by the legislature of Alabama.' " Pet. App. 33a (quoting *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

[11] *See also Cofield v. Randolph County Comm'n*, 844 F. Supp. 1499, 1501-02 (M.D. Ala. 1994); *Forehand v. Roberts*, Civ. A. No. 92-A-601-N, 1992 WL 554241, at 1 (M.D. Ala. August 11, 1992); *Smith v. Arndt*, No. CV 92-H-1227-NE, 1992 WL 547727, at 1 (N.D. Ala. July 14, 1992); *Sanders v. Miller*, 837 F. Supp. 1106, 1109-10 (N.D. Ala. 1992).

ible for the conduct at issue."); *Soderbeck v. Burnett County*, 821 F.2d 446, 451-52 (7th Cir. 1987) (where state law designates sheriff as a state official, and he is independent of county control in the area of law enforcement, sheriff is not a county policymaker for purposes of section 1983).

This straightforward conclusion is confirmed by aspects of state law the Eleventh Circuit did not discuss in its opinion—specifically, the law establishing who *does* oversee sheriffs in the exercise of their law enforcement functions. The *only* officials authorized to do so are state officials. Thus, by statute, the governor, the attorney general and the district attorney are authorized to direct a sheriff to undertake a criminal investigation and report the results. Ala. Code § 36-22-5.[12] The governor may also require a written report, under oath, about any aspect of a sheriff's duties. Ala. Const. art. V, § 121. If misconduct occurs, impeachment proceedings against a sheriff are initiated by the Attorney General, at the Governor's request, and tried before the Alabama Supreme Court—a reform intended to tighten state control over law enforcement activities by sheriffs in order to protect the civil rights of private citizens.[13] Finally, the minimum qualifications and training requirements for sheriff's office personnel are all specified in a state statute, with a state agency determining which training programs are adequate. Ala. Code § 36-21-46. County commissions, by contrast, cannot direct the activities of sheriffs and cannot, under any circumstances, remove them from office.

Petitioners and their *amici*, without denying that sheriffs operate free of control by county commissions, seek to dilute the impact of that fact in various ways.

[12] Moreover, the state legislature is, of course, free at any time to address any aspect of a sheriff's performance.

[13] *See* pp. 3-4 *supra*. This impeachment power has been exercised on a number of occasions. *See Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987) (citing examples).



For example, they point out that some state employees, such as employees of the state police, are more closely supervised at the state level than are sheriffs. But the fact that the State has allowed sheriffs (along with many other officials) a fair degree of autonomy in their everyday operations does not mean that *counties* are somehow responsible for their actions. The State retains a significant oversight role; a county commission has none whatsoever.

Similarly, petitioners suggest that the funding of sheriffs by counties is somehow significant. But, as we have noted, this funding is governed by state-law mandates that sheriffs may enforce in court, including a statute setting sheriffs' salaries, *id.* § 36-22-16, and another requiring provision of all necessary equipment and supplies, *id.* § 36-22-18. This funding mechanism thus represents an *obligation* imposed on counties, not a grant of authority. There is no reason to assume that the intent or the effect was to give counties a role in law enforcement. *Cf. Soderbeck*, 821 F.2d at 451 (Wisconsin sheriff not a county policymaker, although locally elected and funded through county).

For these reasons, the Eleventh Circuit had no real choice but to conclude that Chambers County could not be sued based on the law-enforcement activity of Sheriff Morgan. As Justice O'Connor observed in her plurality opinion in *Praprotnik*, the "States have extremely wide latitude in determining the form that local government takes," and this has predictably produced "a rich variety of ways in which the *power of government* is distributed among a host of different officials and official bodies." 485 U.S. at 124-25 (emphasis added). Given this reality, "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126. Nor should it second-guess state-law limitations on municipal policymaking, by holding a county liable for

"policies" adopted by an autonomous state official with respect to matters that are wholly outside the authorized scope of county activity.

## III. PETITIONERS' ARGUMENT FOR TREATING AN ALABAMA SHERIFF AS A COUNTY POLICYMAKER IS NOT ONLY UNPERSUASIVE BUT FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S RULING IN *MONELL*.

Petitioners respond to the ruling below, not by disputing the Eleventh Circuit's analysis of state law, but by reframing the question. They suggest that the power of the Chambers County Commission in the area of law enforcement is irrelevant, because the Sheriff himself is properly viewed as an autonomous local official who sets law enforcement policy for "the County." They base this conclusion on the fact that the Sheriff has some of the characteristics commonly associated with local officials—*i.e.*, (1) local election, (2) a local area of operations, and (3) funding through the county budget process.

This argument amounts to an assertion that the Sheriff "looks like" a county official and therefore must be a county policymaker.[14] The flaws in such a superficial approach, and the virtues of the Eleventh Circuit's focus on the actual allocation of power in the Alabama governmental structure, are readily apparent if one looks at the decision in which this Court first recognized municipal liability under section 1983—*Monell*. It is striking that,

[14] Petitioners go so far as to quote general treatises on law enforcement, and to analyze the etymology of the word "sheriff," Pet. Br. 18-19—as if either of these sources could establish what governmental structure currently exists in Alabama. For what it may be worth, their linguistic analysis is incomplete. "Sheriff" is a combination of the Old English words for "shire" and "reeve." Webster's Third New Int'l Dictionary 2094 (1986). A "reeve," in turn, was a "local administrative agent of the king in Anglo-Saxon times." *Id.* at 1907. Thus, a "sheriff" in Britain usually administered a county or shire "by royal appointment," *id.* at 2094, and was not a "local" official in the usual sense.



in the first post-*Monell* case dealing with the question whether a given official is properly treated as a state policymaker or a county policymaker, petitioners and their *amici* say little or nothing about *Monell* itself. The reason is clear: the Court's opinion in that case *precludes* a ruling for petitioners here.

### A. Petitioners' Argument Cannot Be Squared with the Primary Factor that Led this Court to Recognize Municipal Liability in *Monell*—the Status of Municipalities as Separate "Corporations" Under State Law.

The first aspect of *Monell* that is relevant here is the basis on which this Court decided to treat municipalities as "persons" within the meaning of section 1983—the fact that they are organized as "corporations" under state law.[15] The *Monell* Court determined, based on the Dictionary Act and various court decisions, that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. In the Dictionary Act, passed just months before the Civil Rights Act of 1871, Congress had provided that " 'in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.' " *Id.* at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). The Court thus concluded that "the

[15] Much of the *Monell* decision was devoted to explaining why the Court was wrong in *Monroe v. Pape*, 365 U.S. 167 (1961), when it held that the legislative history of the Civil Rights Act of 1871 (more specifically Congress's rejection of the "Sherman amendment") precluded an interpretation of the statute as covering municipalities. The only affirmative support for municipal liability identified by the *Monell* Court in the legislative history came in (1) various statements anticipating a broad interpretation of the statute, and (2) statements by Representative Bingham anticipating that takings claims would be actionable under the statute. 436 U.S. at 683-87.

'plain meaning' of [section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued." *Id.* at 689.

This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion.[16] It was what led the Court to equate municipalities with the other "persons" who could be sued under section 1983—*i.e.*, individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86 ("[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [section 1983] . . . there is no reason to suppose that municipal corporations would have been excluded from the sweep of [section 1983]."). [17]

Eleven years later, the Court followed the same approach when it came time to decide whether the states themselves are "persons" within the meaning of section 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), the Court again discussed the definition of "person" in the Dictionary Act, concluding that the phrase "bodies politic and corporate" was "used to mean

[16] *See, e.g.*, 436 U.S. at 668 (opponents of Sherman amendment thought Congress could not "obligate *municipal corporations* to keep the peace if those corporations were neither so obligated nor so authorized by their state charters") (emphasis added); *id.* at 669 (constitutional objections to Sherman amendment "would not have prohibited congressional creation of a civil remedy against state *municipal corporations* that infringed federal rights") (emphasis added).

[17] *See also* 436 U.S. at 682 (1871 Congress saw "no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State"); *id.* at 707-08 (Powell, J., concurring) ("Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right . . . . Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.").



*corporations, both private and public (municipal)*, and not to include the States," *id.* at 69 (emphasis added). The Court in *Will* thus left *Monell* undisturbed, while holding that Congress did not intend to authorize suits against "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." *Id.* at 70.[18]

In recognizing this distinction, the Court was not drawing on a clean slate. The "perception of local political subdivisions as mere chartered corporations remained largely unchanged during the nineteenth century." Durschlag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DePaul L. Rev. 577, 590 (1994). Moreover, the common law has long differentiated between municipal corporations and other governmental entities created by the state by allowing only the former to be sued for the torts of their agents. *See, e.g.*, 2 J. Dillon, *Municipal Corporations* § 966 (4th ed. 1890) ("As respects *municipal corporations proper*, whether specially chartered or voluntarily organiz[ed] . . ., it is, we think, universally considered . . . that *they are liable for acts of misfeasance* . . . done by their authorized agents or officers . . . .") (emphasis in original).[19]

But accepting petitioners' argument—that the Chambers County Commission is liable for policies created by the incumbent in an office that it did not create and cannot control—would require the Court to abandon this con-

[18] In this instance, the district court dismissed all damages claims against the Sheriff in his official capacity on Eleventh Amendment grounds. Petitioners have not questioned that ruling, even as they have persisted in pursuing claims against the County.

[19] Indeed, the traditional rule was that incorporated cities could be sued but counties could not, precisely because the latter were not formally chartered as corporations and thus were viewed as "political divisions of the State created for convenience." 2 J. Dillon, *supra*, § 963; *see* 18 E. McQuillin, *Municipal Corporations*, § 53.05 (3rd ed. 1993).

ception of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is almost incoherent to suggest that a single corporation can include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the way that the *Monell* Court referred interchangeably to suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity," *id.* at 694.

Indeed, the precise issue raised here by petitioners—whether a county as a municipal corporation can encompass both a governing board and an autonomous sheriff—was anticipated by one of the congressmen whose statements in the 1871 debates were partially quoted in *Monell* (*see id.* at 680), Representative Burchard. As he put the matter:

> *Police powers are not conferred upon counties as corporations.* . . . The county commissioners . . . have [the] power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. *These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county* . . . . But still in few, if any, States is there a statute conferring this power upon the counties.

Cong. Globe 795 (April 19, 1871) (emphasis added). Representative Burchard then went on to express his opposition to the "Sherman amendment"—a proposal that would have held counties liable for failure to enforce the law within their borders—asserting that it was an "attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance." *Id.* Thus, at least to him, it was clear that the existence of a sheriff in



a county did not mean that the county as a corporation had any role in, or responsibility for, law enforcement—or that it was constitutional to pretend otherwise by imposing liability on counties when sheriffs failed to keep the peace.

In essence, what petitioners ask the Court to adopt is a radically different conception of "Chambers County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that geographic area.[20] But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under section 1983 was the *Monell* Court's understanding of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

### B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioners' position and *Monell* is even clearer in light of the Court's second holding—that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy*

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[20] State officials whose functions "concern the whole state or its people generally, although territorially restricted," such as sheriffs, district attorneys, and judges, are common. Traditional local government law treats these as officers distinct from municipal officers, whose "powers and duties relate exclusively to matters of purely local concern." 2 E. McQuillin, *supra*, § 4.115, at 245-46.

of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added). *See also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Chambers County as a municipal corporation (or the Chambers County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioners' constitutional rights.

**1. *Origins of the Causation Requirement.***

The causation requirement in *Monell* was derived, in part, from the language of section 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692. *See also Pembaur*, 475 U.S. at 478 ("*Monell* is a case about responsibility.")

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Id.* at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained section 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See*



*Monell*, 436 U.S. at 666 (quoting the first conference version of the amendment). *See also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673. Numerous members of the House asserted in the debates that "[c]ounties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." Cong. Globe 794 (April 19, 1871) (Rep. Poland). *See also id.* at 791 (Rep. Willard) ("The city and the county have no power except the power that is given them by the State."); p. 22 *supra* (quoting Rep. Burchard). The majority thus objected that "if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the power to go in there and say, 'You shall have a police, you shall have certain rules by which you may fulfill your obligation' " to keep the peace. *Id.* at 795 (Rep. Blair).

In sum, the legislative history reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law,

section 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

### 2. *Application of the Requirement Here*

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a glaring conflict between petitioners' position and the *Monell* Court's specific holding that section 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit held, the State of Alabama "has not assigned the counties any law enforcement authority." Pet. App. 33a-34a. The Chambers County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioners now say that the Commission should face potential liability under section 1983 based entirely on the law enforcement actions of Sheriff Morgan.

Indeed, under petitioners' theory, the Commission's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. But that is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law-enforcement functions not delegated to them by state law. Thus, here again, petitioners ask the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, this Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor—or, in other words, . . . on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, can



hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693. *See also Jett*, 491 U.S. at 728-29. Petitioners' argument, however, would have the perverse effect of allowing a form of vicarious liability under section 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

*Respondeat superior* is a doctrine that holds a "master" liable for the torts of a "servant" acting within the scope of his assigned duties. A "servant" is traditionally understood to be "a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service *is controlled, or is subject to a right of control*, by the other." *Prosser & Keeton on Torts* § 70, at 501 (5th ed. 1984) (emphasis added). This principle has been consistently applied in the context of municipal liability law. Thus, one leading treatise states that, in "order to hold a municipality liable in damages because of the tort of one alleged to be its servant, it must appear, and the plaintiff must prove, that the latter was the servant of the municipality at the time of the alleged tort." 18 E. McQuillin, *supra*, § 53.66, at 445. Moreover, "[t]he *right to control* the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the alleged wrong arose . . . governs in determining whether a municipality is liable under the rule of respondeat superior. The right to *discharge* or *terminate the relationship* is also important." *Id.* (emphasis added). *See also id.* at 446 ("[A] county and its commissioners are not liable for the actions of the sheriff or the sheriff's deputies under the doctrine of respondeat superior because they have no control over the acts of those officers.") (citing *Delk v. Board of Comm'rs of Delaware County*, 503 N.E.2d 436 (Ind. App. 1987)); 2 J. Dillon, *supra*, § 974, at 1193 (municipality may be liable for acts of officials if it "appoints or elects them, can control them . . ., can continue or remove them,

[and] can hold them responsible for the manner in which they discharge their trust"; it is not liable for the acts of those who are "independent of the corporation as to the tenure of their office and the manner of discharging their duties" and thus are properly regarded as "public or State officers"); *Parker v. Amerson*, 519 So. 2d at 442 (Alabama sheriffs are not county employees "for purposes of imposing liability . . . under theory of respondeat superior"); *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991) (same).

Yet petitioners, purporting to apply an "official policy" standard that was supposed to be more restrictive than *respondeat superior*, advocate a rule of vicarious liability that goes beyond *respondeat superior*—indeed, beyond anything heretofore known to tort law. After all, they seek to hold the Chambers County Commission strictly liable for the acts of an official over whom it has *no* control. And they do so in reliance on factors—such as the Sheriff's election by local voters and funding through the County budget—that have been specifically rejected as *insufficient* to justify municipal liability under a *respondeat superior* standard. *See Barnes v. District of Columbia*, 91 U.S. 540, 545-46 (1876) ("Nor can it in principle be of the slightest consequence by what means these several officers are placed in their position—whether they are elected by the people of the municipality or appointed by the President or a Governor."); *id.* at 546 ("It is equally unimportant from what source he receives compensation, or whether he serves without it."); 18 E. McQuillin, *supra*, § 53.67.

Especially in view of this Court's recent admonition that, in interpreting section 1983, courts should "look first to the common law of torts," *Heck v. Humphrey*, 114 S. Ct. 2364, 2370-71 (1994), there is no reason to read the statute in this extreme way. Congress can hardly have intended in 1871 to authorize a form of municipal liability going far beyond *respondeat superior* and requiring cities and counties to exercise power in areas where they are barred from acting by state law.[21]



### C. Nothing in *Pembaur* Supports Petitioners' Position.

Petitioners and their *amici*, while ignoring *Monell*, argue that this case is controlled by the Court's later decision in *Pembaur v. City of Cincinnati*. That case, however, did not deal with the same issue and does not support petitioners' position in this case.

In *Pembaur*, the sole "question presented [was] whether, and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[22] The Sixth Circuit had held that a county sheriff and a county prosecutor were county officials authorized to establish county policy, but had also held that approval of an illegal search on one occasion did not establish a "policy." *See id.* at 476. In the course of ruling that a single decision could constitute an actionable municipal "policy," this Court noted the Sixth Circuit's holding "based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances." *Id.* at 484. The Court went on to say that this was a "conclusion that we do not question here," *id.*, adding in a footnote that "[w]e generally accord great deference to the interpretation and application of state law by the courts of appeals," *id.* at 484 n.13 (citations omitted).

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[21] Thus, the proper reading of *Monell* is that satisfaction of the *respondeat superior* standard is a necessary but not sufficient basis for municipal liability based on acts of executive officials.

[22] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as a sole question presented, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?").

As this summary suggests, it is inexplicable how petitioners could assert that *Pembaur* "requires reversal in the present case." Pet. Br. 11. To begin with, there was no dispute in this Court about whether or not the sheriff in *Pembaur* had the kind of links with the county that made it possible for him to be viewed as a county policymaker. Moreover, when the Court touched on that question in passing, it declined to analyze it—choosing instead to defer to a ruling of the Sixth Circuit on an issue of state law that had not been addressed in the parties' briefs.

In any event, even if *Pembaur* were fairly read as having approved the Sixth Circuit's holding that a sheriff was a county policymaker, the case would have little relevance here. Any such holding in *Pembaur*, of course, would have been based on Ohio law, which, unlike Alabama law, plainly treats sheriffs as county officials.[23] Here, the issue is one of Alabama law, and there is every reason for the Court to adhere to its stated practice of

[23] *See, e.g., State ex rel. Trago v. Evans*, 141 N.E.2d 665, 669 (Ohio 1957) (office of sheriff "is a county office created by legislative enactment"); Op. Ohio Att'y Gen. No. 90-091, at 9 (1990) ("[A] sheriff . . . and his deputies . . . are the chief law enforcement officers of a county."). As in Alabama, Ohio counties fund sheriffs and there is a sheriff in each county. Unlike Alabama, however, Ohio permits home rule, and its counties are recognized as having law enforcement power. *Compare id.* (counties may join with towns to coordinate regional law enforcement efforts), *with* Pet. App. 33a-34a (Alabama counties have no law enforcement role). Moreover, Ohio's chartered counties have significant control over their sheriffs. They control the manner in which sheriffs are chosen and may change the position of sheriff from an elective office to an appointive one. *See* Ohio Rev. Code Ann. § 302.01 (permitting chartered counties to choose an alternative form of government); Op. Ohio Att'y Gen. No. 85-039 (1985) (allowing the appointment of officers who are elected under general state law). In some instances, Ohio county boards select a replacement when the sheriff's office is vacant. *See* Ohio Rev. Code Ann. § 305.02. Moreover, unlike their counterparts in Alabama, Ohio sheriffs have an explicit duty to file reports with the county board. *See* Ohio Code Ann. § 305.19.



"accord[ing] great deference to the interpretation and application of state law" by the Eleventh Circuit in *this* case.

**D. Petitioners Have Offered No Persuasive Reason Why the Court Should Hold Municipalities Liable for the Actions of Officials Whom They Do Not Select or Control.**

Petitioners, having failed to explain why their theory makes legal sense, also fail to advance any other persuasive argument for extension of municipal liability to a case like this one. First, they suggest that it would be anomalous for a locally elected and locally based official to be considered a *state* policymaker. Pet. Br. 17 ("that simply cannot be the case").[24] But nothing could be more commonplace. State judges, for example, in Alabama and elsewhere, are locally elected and locally based.

Indeed, the real anomaly here would be a rule that accords sheriffs, acting in their official capacity, Eleventh Amendment immunity from suit as state officials (as even the district court recognized was necessary, *see* pp. 5-6 *supra*) but simultaneously holds county commissions strictly liable for the constitutional torts of those state officials. This would require a single official to be both a county policymaker *and* the equivalent of the State when sued in his official capacity.

Petitioners also argue that the Eleventh Circuit's approach leaves states the power to insulate municipalities from all liability, simply by relabelling municipal officials as state officials. Pet. Br. 13. But, of course, that is not true either. The only way in which a state could limit municipal liability for the actions of senior municipal officials would be to change the law so that they are no longer controlled by the municipal legislative body.

[24] Although a sheriff is locally elected, a vacancy in that office is filled by the Governor. Ala. Code § 36-9-17. Petitioners' emphasis on mode of selection suggests that they would see two types of sheriffs: those who are elected and are treated as county officials and those who are appointed and are treated as state officials.

Merely designating a mayor or a city police chief as a "state official," without more, would change nothing in the typical urban governmental set-up—because any power exercised by these officials would still be subject to revocation or modification by the city council. And states are hardly likely to go on a binge of restructuring local government so that local lawmakers no longer have control over local executive officials.[25]

Nor would a deterrence rationale justify extending municipal liability to cover this case. This is not a case like *Pembaur*, where it was plausible to say that "[t]he county has the resources and the authority that can best avoid future constitutional violations," 475 U.S. at 490 (Stevens, J., concurring). Here, it is undisputed that if Chambers County is ultimately held liable to petitioners, it will have *no* authority to prevent a recurrence of the alleged constitutional violation. That is precisely why the Eleventh Circuit concluded that no *county* policy was implicated in this case.

Ultimately, petitioners seem to say that it would be unjust for them not to be able to sue a municipal defendant in this case. But that is probably the strangest of all of the arguments presented here. After all, it is the *norm* in section 1983 litigation for plaintiffs to be limited to suing individual defendants. That is what the statute, with its reference to "persons," was intended to accomplish.

This Court has subsequently recognized that municipalities may be "persons" when they *cause* violations of federal rights. But it has also refused, in *Monell* and *Will*, to expand plaintiffs' access to the public funds where the

[25] It is noteworthy, in this regard, that the Supreme Court's decision in *Lincoln County v. Luning*, 133 U.S. 529 (1890), which held that municipal corporations are not protected by the Eleventh Amendment, has had no apparent effect on the proliferation of municipal corporations and local government entities. *See* Durschlag, *supra*, at 615. There is thus no reason to believe that a decision for respondent in this case would lead to a massive restructuring of local government.



only justification is their desire for a "deep pocket." Indeed, *Monell* expressly rejected reliance on the perceived need to "spread" the "costs" of governmental torts to the public as a whole as a basis for importing a rule of vicarious municipal liability into section 1983. 436 U.S. at 694-95.

In sum, there is no reason to warp the principles of municipal liability in this case to give petitioners one more defendant to sue. This Court has recognized that Congress intended to allow municipalities to be sued under section 1983 in a specific set of circumstances—when they adopt policies that lead to deprivations of federal rights. It is entirely spurious to suggest that, in this case, the Chambers County Commission did any such thing.

## CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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